

Haco Engineering Company and Robert Mandicino.
Case 18-CA-7322

October 8, 1982

DECISION AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On August 20, 1982, Administrative Law Judge Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs¹ and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Haco Engineering Company, Sioux City, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In his summary regarding an incident between Vice President Carnes and Mandicino in April 1981, the Administrative Law Judge inadvertently erred in finding that Carnes claimed Bruneau, rather than Mandicino, said he would never work for Respondent.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge: This case was heard in Des Moines, Iowa, on January 11-12, 1982. The charge was filed by Robert Mandicino on July 7, 1981,¹ and the complaint was issued on August 19. The primary issues are whether Haco Engineering Company, herein called the Company or the Respondent, (a) informed former union steward Mandicino on March 16

that he would not be rehired because of his past union activities, and (b) discriminatorily refused since June 29 to reemploy him because of his union or other protected concerted activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Company, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, an Iowa corporation, is a sheet metal contractor in Sioux City, Iowa, where it annually purchases goods valued over \$50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 37 (now merged into Local 3), Sheet Metal Workers' International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Resentment to Activity as Union Steward

Robert Mandicino, a sheet metal worker with 14 years of experience, had worked for the Company about six times. On several occasions before the contested merger of Local 37 (in Sioux City) with Local 3 (in Des Moines), he was appointed by Business Agent Wayne Cain to serve as union steward. While serving as steward on various jobs of the Company, Mandicino had several "run-ins" with Company Vice President Donald Carnes over minor contract violations.

Two of these confrontations were on the telephone company job. On the first occasion, Union Steward Mandicino found Vice President Carnes and Foreman John McGinty measuring, laying out fittings on the floor. Mandicino informed Carnes that Mandicino was the steward, that Carnes no longer had an active card in the Union, and that "he wasn't to measure anything on the job from this point on." Showing his resentment, Carnes telephoned Business Agent Cain and asked, "Is that bearded son of a bitch the only type that we have available for work?" Cain asked about the problem, and Carnes said, "Well, I was up to the telephone company and I had some rough words with him and I want to get rid of him." Cain responded that Mandicino was a steward and "that would create problems." Several days later, Mandicino again found Carnes and McGinty doing some measuring, using a ruler on the floor. This time Mandicino kicked or nudged the ruler with his foot away from Carnes' hand and said, "I told you don't measure nothing on the job, and I mean it; and the next time I catch you, I'm going to shut the job down, and we're going to get this thing straightened out." This time, McGinty as well as Mandicino reported that Mandicino had nudged Carnes' ruler with his foot and had stated to Carnes, "I thought I told you you're not supposed to measure."

¹ All dates are in 1981 unless otherwise indicated.

In support of the Company's defense to the charge that later, after Cain was replaced by Richard Bruneau as business agent, Mandicino was refused employment because of his activities as union steward, Vice President Carnes and Foreman McGinty both claimed that they did not recall the ruler-nudging incident. I discredit the denials.

On other occasions, while serving as union steward, Mandicino objected to the use of fittings without the union label (inducing Carnes to replace them with union-label fittings, although Carnes said, "they've always installed them . . . and that he didn't see nothing wrong with it"), and twice objected to Carnes' failure to upgrade an employee working as acting foreman for 2 days. Once when Mandicino was working for another contractor on the Penney building, he and journeyman Orvall Hindman objected to one of the Company's truckdrivers handling material for work inside the building. Carnes told Mandicino and Hindman it was common practice for the Company to have truckdrivers unload and distribute the material. Mandicino said that, according to the contract, the truckdriver was allowed to place the material on the jobsite but not to distribute it. Carnes indicated that it was none of their business because they were not working for the Company. Mandicino responded that they were sheet metal workers, that this was sheet metal work, and that they were obligated to protect their work under any circumstances.

Vice President Carnes revealed his continued resentment to Mandicino's union activity in December 1980 (after Business Agent Bruneau replaced Wayne Cain), when interviewing journeyman Hindman for a foreman's job. As credibly testified by Hindman (who impressed me as an honest, forthright witness), Carnes asked him how he stood with the Union. Upon being told that he did not have anything to do with the Union since Bruneau took over, Carnes said that was good, "we don't want any *radicals* around like Mandicino. I don't want any trouble on my jobs." (Emphasis supplied.) About a month or two later when Hindman asked Carnes why he would not hire Mandicino and another journeyman, Carnes became angry and answered "that he could hire any damn body he wanted to hire and it wasn't any of my business. I said do you know that those guys are a lot more qualified than some of the people you have on this job" and "again he said it was his business who he hired."

Carnes also mentioned Mandicino in late December 1980 when interviewing journeyman Kenneth Houlsworth. As credibly testified by Houlsworth, Carnes explained why he had been unwilling to hire Houlsworth before and stated, "I was a troublemaker and referred to Orvall Hindman and Bob Mandicino as being troublemakers, over union jobs." Carnes said he had a long talk with Hindman and had him "straightened out," but he would not hire Mandicino because he was a "*troublemaker over union related things* on the job." (Emphasis supplied.) Houlsworth told Carnes, "I needed the job real bad, I'm hungry," and "guaranteed him I would not start any trouble." Carnes then said he could go to work.

Thus, as early as December 1980, Vice President Carnes revealed his decision not to hire Mandicino be-

cause of his protected concerted activity as a union steward and union supporter.

B. Threat Not To Hire

On March 12, Business Agent Bruneau wrote Mandicino a letter regarding Mandicino's efforts to get a referral to the Company's hospital job. (By this time, the General Counsel had issued a complaint against the Union in Case 18-CB-1041, based on charges filed by Mandicino and other opponents of Bruneau, alleging discriminatory referrals by the Union. Finally, on September 14, after a long adjournment (see G.C. Exh. 11), a settlement was reached with the Union.) In the letter Bruneau stated: "Don Carnes, Vice President of Haco Engineering, has informed me that he has had you in his employment before and he will not hire you again because of your past performance." (G.C. Exh. 2.)

On March 16, as Mandicino credibly testified, he telephoned Carnes and said he was pretty upset about the statement in the letter that Carnes refused to hire him because of his past performance. Carnes responded that he had not said that, that "my work was good, I had always done good work for him," and that "he had told Bruneau that the reason that he wouldn't hire me was because of my union activities . . . I asked him what he meant by my union activities" and Carnes answered "there was just too many union meetings when I was on the job" (evidently referring to his activities as steward). Carnes said he had an understanding with Bruneau that "Bruneau was not going to send him any radical sheet metal workers, such as myself," and that he "wanted people that fit into his program" and "thought like he did." Carnes explained, "I don't want nobody that's going to nitpick the contract and cram it down my throat every time they turn around over minor violations of the contract."

I agree with the General Counsel that it is clear, as alleged in the complaint, that Vice President Carnes' statement to Mandicino that he would not hire Mandicino because of his past union activities was coercive and violated Section 8(a)(1) of the Act. (I find it unnecessary to rule on the allegation of a similar coercive statement on July 2.)

C. Refusal To Hire

On June 18 (long after Vice President Carnes' decision not to rehire Mandicino because of lawful activity as a union steward), Carnes notified Business Agent Bruneau in writing that he needed four sheet metal workers on the hospital job. He stated in the letter that he would not consider Mandicino for employment because

In one of my job visits in April of 1981, I found that Bob Mandicino had trespassed without safety equipment and no job related reason to be at Marlan Health Center talking to two of my men. As I approached them, Bob started to curse and harass me. The last thing he said was I never did like you and I would never work for Haco Engineering.

It is undisputed that Mandicino did use some curse words, complaining about Carnes' relationship with Business Agent Bruneau and discriminatory referrals. There is no corroboration of Carnes' claim that Bruneau said he would never work for the Company. (Carnes, who impressed me by his demeanor on the stand as being less than candid, gave conflicting versions of what was said.

On June 29, after the hearing of the union discrimination case began, Business Agent Bruneau asked Mandicino if he wanted to go to work at Haco Engineering. Mandicino said he did, and Bruneau gave him a referral slip to report to Carnes. (G.C. Exh. 3.) Upon reporting to Carnes' office, Mandicino apologized for saying anything derogatory in the April conversation. Carnes said he had been really upset for several days, and Mandicino said he had been upset for several months because of Carnes' refusal to hire him and another employee.

In the conversation, Carnes said he was not going to hire Mandicino, that "I didn't fit into this program." Mandicino asked if he would put it in writing that he would not hire Mandicino, and he responded that he had already put it in writing in a letter to Bruneau. Mandicino said, "I have no knowledge of any letter. All I know is that Bruneau called me and asked me to go to work at Haco, and I said yes."

Although Vice President Carnes stated in the June 18 letter to Business Agent Bruneau that he would not hire Mandicino because of the cursing incident in April, I find after weighing all the evidence that the incident was a mere pretext for not rehiring Mandicino. Carnes had decided months before not to rehire Mandicino because of his protected concerted activities as union steward—not wanting anybody "that's going to nitpick the contract and cram it down my throat every time they turn around over minor violations of the contract." Carnes had admitted having an understanding with the new business agent that "Bruneau was not going to send him any radical sheet metal workers," and had called Mandicino a "radical" and "troublemaker," referring to his union activities. On June 29, when he rejected Mandicino's referral, Carnes again stated that Mandicino "didn't fit into his program," obviously referring to Mandicino's efforts to enforce the terms of the union agreement.

I therefore find that, since June 29, the Company has discriminatorily refused to reemploy Mandicino because of his union or other protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

I note that, in its brief, the Company contends that the issue in this proceeding is whether the Company discriminates in hiring, discouraging membership in a labor organization. The brief fails to urge that I defer to the ruling of the local joint adjustment board in an unidentified grievance filed by Mandicino against the Company. There is no showing that the issues in the present case were submitted, considered, or resolved in the grievance procedure, or that the procedure was fair and regular—the union representatives being selected (without Mandicino's approval), and the grievance being presented, by Mandicino's political enemy, Business Agent Bruneau.

CONCLUSIONS OF LAW

1. By discriminatorily refusing to reemploy Robert Mandicino since June 29, 1981, because of his union or other protected concerted activities, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

2. By making the statement to Mandicino that it would not hire him because of his past union activities, the Company violated Section 8(a)(1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to reemploy an employee, it must offer him employment and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the refusal to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corporation*, 231 NLRB 681 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon these findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER²

The Respondent, Haco Engineering Company, Sioux City, Iowa, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to reemploy or otherwise discriminating against any employee for activities upon behalf of Local 3, Sheet Metal Workers' International Association, AFL-CIO, or any other union.

(b) Threatening not to reemploy any union steward or other employee because of his past union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Robert Mandicino immediate employment as a journeyman sheet metal worker, granting him the same seniority and other rights and privileges he would have enjoyed absent the discriminatory refusal to reemploy him, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the Decision.

² If no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections to them shall be deemed waived for all purposes.

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Sioux City, Iowa, copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon their receipt thereof and be maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to reemploy or otherwise discriminate against any of you for supporting Local 3, Sheet Metal Workers' International Association, AFL-CIO, or any other union.

WE WILL NOT threaten not to reemploy any union steward or other employee because of his past union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Mandicino immediate employment as a journeyman sheet metal worker, granting him the same seniority and other rights and privileges he would have enjoyed if we had not refused to reemploy him and WE WILL make him whole for any loss of earnings and other benefits, less any net interim earnings, plus interest.

HACO ENGINEERING COMPANY